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No. 94-1471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VARITY CORPORATION,
Petitioner,
v.

CHARLES HOWE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agen-

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[1] This brief is being filed with the written consent of the parties pursuant to this Court's Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of the Court.

cies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a number of ERISA cases decided by this Court.[2]

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans, both pension and welfare, covered by ERISA. The decision below profoundly and adversely affects the Chamber's members by exposing them to liability beyond that contemplated by Congress in ERISA.

SUMMARY OF ARGUMENT

I. Claims of breach of fiduciary duty may not be brought under ERISA section 502(a)(3). The liability of, and causes of action against, ERISA fiduciaries are governed by ERISA sections 409(a) and 502(a)(2). Because Congress has directly addressed the question of actions for breach of fiduciary duty in these sections, the more general language of section 502(a)(3) should not be construed to cover the same ground.

The court of appeals' ruling not only violates this basic precept of statutory interpretation but poses serious practical problems as well. It paves the way for ERISA plan participants to append a fiduciary breach claim under ERISA section 502(a)(3) against additional defendants to a standard contract claim under ERISA section 502(a)(1)(B) against the plan whenever a benefit claim is denied. Claims administrators and other third party service providers—who in most courts today are not

[2] *See Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995); *District of Columbia* v. *The Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992); *Patterson* v. *Shumate*, 113 S. Ct. 13 (1992); *Ingersoll-Rand* v. *McClendon*, 498 U.S. 133 (1990); *FMC* v. *Holliday*, 498 U.S. 52 (1990); *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

susceptible to personal liability to participants for benefits determinations—would be forced to defend and pay recoveries under these additional claims, thereby increasing the overall cost of benefit plan administration and offsetting private sector efforts to manage health care spending.

II. ERISA does not impose upon a person or entity all of the communications duties of a common law trustee whenever such person communicates benefits information. A number of courts, including the one below, have held that ERISA's fiduciary duty rules impose upon persons communicating benefits information to plan participants the affirmative duty to accurately communicate all material information relating to participants' circumstances.

This broad duty fails, however, to give effect to the definition of fiduciary conduct found in section 3(21)(A) of ERISA. Under that section, a person is a fiduciary with respect to a plan "to the extent" he exercises discretionary control or authority over the administration, management, or assets of the plan. The effect of this language is to attach fiduciary obligations to the performance of certain conduct relating to a plan, and only such conduct. In this regard, ERISA does not mirror the common law of trusts. The contrary approach below would encourage plan participants to avoid reviewing and understanding the detailed written materials that ERISA requires be provided to them, and would shift to employers and third party plan administrators the full risk of loss when a plan participant misunderstands his benefits rights and obligations. ERISA's detailed reporting and disclosure rules and circumscribed definition of fiduciary conduct do not support the imposition of such open-ended non-enumerated fiduciary duties of communication.

III. An award of money to reimburse ERISA plan participants for lost health insurance benefits is not "appropriate equitable relief" under section 502(a)(3) of

ERISA, which authorizes the award of only traditional equitable remedies. The attempt by the court below to characterize such relief as "restitution" was in error.

The equitable remedy of restitution has two accepted meanings: (1) recovery based on and measured by unjust enrichment and (2) restoration in kind of a specific thing wrongfully taken away. The relief awarded by the court of appeals conforms to neither of these meanings. Courts and commentators alike have concluded that, to be a legally meaningful concept, restitution must be distinguished from compensation. Because the monetary remedy awarded by the court of appeals was intended to compensate participants for lost benefits, such relief was not "restitution" but ordinary damages. Therefore, it was not authorized by ERISA section 502(a)(3).

ARGUMENT

Implicated in this case are three questions of considerable importance to employee benefit plan sponsors, participants, and service providers. The first is whether ERISA plan participants may bring an action for breach of fiduciary duty—not only under ERISA section 502 (a)(2), which expressly authorizes actions against plan fiduciaries—but also under the general language of ERISA section 502(a)(3), which authorizes courts to award "appropriate equitable relief." The second is whether ERISA imposes upon persons communicating benefits information all of the duties borne by common law trustees. And the third is whether compensatory "restitution" of the sort awarded by the court of appeals in this case falls within the "appropriate equitable relief" authorized by ERISA section 502(a)(3). The answer to each of these questions is no.

I. CLAIMS OF BREACH OF FIDUCIARY DUTY MAY NOT BE BROUGHT UNDER SECTION 502(a)(3) OF ERISA.

In the Employee Retirement Income Security Act of 1974 (ERISA), as amended, Congress set "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and provided "appropriate remedies" for violations of those standards. ERISA § 2(b), 29 U.S.C. § 1001(b). ERISA contains a series of interrelated provisions which (1) assign fiduciary status to those who perform certain plan functions; (2) establish standards of conduct according to which such fiduciary duties must be discharged; (3) impose liability and specify available remedies for violations of those standards; and (4) create a cause of action to redress such violations. These provisions governing the obligations and liabilities of ERISA fiduciaries form a seamless statutory web, and it is inappropriate to construe more general language found elsewhere in ERISA to create a freestanding cause of action for breach of fiduciary duty.

Within its definitions section, ERISA declares that "a person is a fiduciary" with respect to a plan "to the extent" he exercises discretionary control or authority over the plan's management, administration, or assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 523-524 (1993). Section 404 of the statute—captioned "Fiduciary Duties"—requires ERISA fiduciaries *inter alia* to discharge their plan-related duties prudently and solely in the interests of plan participants. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Section 406 of ERISA adds to these general obligations by prohibiting a fiduciary from involving a plan in certain specified transactions. 29 U.S.C. § 1106.

The liability of, and causes of action against, ERISA fiduciaries are governed by sections 409(a) and 502

(a)(2) of the statute. Section 409(a) "makes fiduciaries liable for breach of the[ir] duties, and specifies the remedies available against them." *Mertens* v. *Hewitt Associates,* 113 S. Ct. 2063, 2066 (1993). Captioned "Liability For Breach of Fiduciary Duty," section 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 [29 U.S.C. § 1111] of this Act. [29 U.S.C. § 1109(a).]

In turn, section 502(a)(2) of ERISA—one of the statute's "six carefully integrated civil enforcement provisions," *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 146 (1985)—provides that "[a] civil action may be brought—by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 of this title." 29 U.S.C. § 1132(a)(2). Section 502(a)(2) is thus "the enforcement provision for section 409." *Russell,* 473 U.S. at 142 n.9. Taken together, sections 409(a) and 502(a)(2) impose liability upon errant fiduciaries, create a cause of action against them, and specify the available remedies.

In *Russell,* this Court held that a plan participant who brought suit under sections 409(a) and 502(a)(2) alleging fiduciary misconduct could not recover extracontractual damages personally, as opposed to for the benefit of the plan.[3] In this case, the court of appeals, adopting the view expressed by Justice Brennan for a minority of the Court in *Russell,* held that a plan participant who brought suit under section 502(a)(3) alleging fiduciary misconduct *could* recover equitable relief personally.[4] The court of appeals' holding was in error.

To begin with, this Court determined in *Russell* that sections 409(a) and 502(a)(2) reflect "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." 473 U.S. at 142 n.9. The court of appeals' construction to permit plaintiffs to do under section 502(a)(3) what *Russell* held they could not do under section 502(a)(2)—*i.e.,* recover personally in a fiduciary breach action—is flatly inconsistent with this congressional intent and thus highly implausible in "an enforcement scheme crafted with such evident care." 473 U.S. at 147. *See Vespasian* v. *Sweeney,* No. 93-4343, 1995 WL 154982, *3 n.3 (6th Cir. Apr. 6, 1995) (per curiam) (criticizing the decision below). The better view is that ERISA sections 409(a) and 502(a)(2) "provide[] the sole basis for a suit alleging breach of fiduciary duties." *Simmons* v. *Southern Bell Tel. & Tel. Co.,* 940 F.2d 614, 617 (11th Cir. 1991).

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[3] The Court did say that ERISA permits plan participants and beneficiaries personally to recover "contractual damages"—*i.e.,* "damages for loss of plan benefits." 473 U.S. at 138. Relief of that sort is plainly authorized by section 502(a)(1)(B) of ERISA, which provides that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, [and] to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). *See Russell,* 473 U.S. at 144 (section 502(a)(1)(B) is "the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan").

[4] Section 502(a)(3) provides:

> A civil action may be brought—by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. [29 U.S.C. § 1132(a)(3).]

Furthermore, "it is a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citing *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). *See also Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-736 (1989); *id.* at 738-739 (Scalia, J., concurring in part and in the judgment). This canon of construction strongly points to the conclusion that the general language of section 502(a)(3) does not create a cause of action for breach of fiduciary duty overriding the carefully delimited action found in section 502(a)(2).

Highly instructive in this regard is *HCSC-Laundry* v. *United States*, 450 U.S. 1 (1981) (per curiam). Petitioner in that case was a nonprofit provider of hospital laundry services that sought tax-exempt status as a charitable organization under section 501(c)(3) of the Internal Revenue Code. This Court, however, held that section 501(e) of the Code—which exempts from taxation "cooperative hospital service organizations" that provide certain services to hospitals—was the exclusive Code provision under which petitioner could obtain an income tax exemption. Because laundry services was not one of the services listed in section 501(e), this Court held that petitioner was not entitled to an exemption. It reasoned that "it is a basic principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when the two are interrelated and closely positioned, both in fact being parts of section 501 relating to exemption of organizations from tax." 450 U.S. at 6. Since section 501(e) "expressly concerns the tax status of a cooperative hospital service organization," the Court concluded that "subsection (e) is controlling and exclusive, and because petitioner does not qualify under it, exemption is not available." 450 U.S. at 5, 6.

Like the Code provisions at issue in *HCSC-Laundry*, ERISA sections 502(a)(2) and 502(a)(3) are "interrelated and closely positioned" subparts of the same statutory section, and both subsections pertain to the same subject matter—enforcement actions under ERISA. Of the two, however, it is section 502(a)(2) that "expressly concerns" actions for breach of fiduciary duty. Under *HCSC-Laundry*, therefore, section 502(a)(2) must be deemed "controlling and exclusive." Because Congress has spoken directly to the matter of actions for fiduciary breach in section 502(a)(2), the general language of section 502(a)(3) should not be construed to occupy that same field. *Cf. Russell*, 473 U.S. at 147 ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it") (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)); *see also Kemp* v. *Control Data Corp.*, 785 F. Supp. 74, 76 (D. Md. 1991) (allowing broader relief under section 502(a)(3) than section 502(a)(2) would render the latter "entirely nugatory").

Although the language of section 502(a)(3) might literally be read to make actionable a breach of fiduciary duty claim, this Court has eschewed construing ERISA's terms as broadly as possible when narrower constructions were better suited to the statutory context. In *Russell*, the court of appeals held that compensatory damages were available under that part of section 409(a) authorizing courts to grant "such other equitable or remedial relief as the court may deem appropriate." Yet this Court concluded that to so read section 409(a)'s " 'catchall' remedy * * * would render superfluous" the other language in 409(a) "providing relief singularly to the plan." *Russell*, 473 U.S. at 141, 142.

Similarly, in *Mertens*, the Court construed section 502(a)(3)'s use of the phrase "appropriate equitable relief" to encompass only traditional equitable remedies,

even while conceding that the phrase "can assuredly" have the broader meaning of "whatever relief a court of equity is empowered to provide in the particular case at issue." 113 S. Ct. at 2068-69.[5]

The court of appeals' construction would also create incompatible legal standards for courts hearing benefit claim disputes. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court held that in actions to recover benefits under ERISA section 502(a)(1)(B), trial courts should review the plan fiduciary's denial under a *de novo* standard, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. If that authority is provided, the court reviews only for abuse of discretion. *Id.* Consequently, when deciding section 502(a)(1)(B) claims, courts often defer to a fiduciary's administrative judgments and plan interpretations, and approve such interpretations even when the plan may be susceptible to a contrary interpretation more favorable to participants.[6]

But as *Firestone* recognized, *see* 489 U.S. at 113, the act of granting or denying a claim for ERISA regulated benefits is a fiduciary act, cloaking the person rendering

[5] The construction of section 502(a)(3) advanced here does not, of course, render that provision meaningless. ERISA sections "enforceable under section 502(a)(3) include the reporting and disclosure provisions, the minimum participation, vesting, accrual, joint and survivor, and funding standards, the health care coverage continuation provisions, the bonding requirements of ERISA section 412, and the prohibitions of ERISA section 510 against interference with rights protected by ERISA." Employee Benefits Law 616 (S. Sacher, J. Gibbs & H. Shapiro et al. eds. 1991) (footnote omitted).

[6] *See Finley* v. *Special Agents Mut. Benefits Ass'n, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992); *Jordan* v. *Cameron Iron Works, Inc.*, 900 F.2d 53, 55-56 (5th Cir.), *cert. denied*, 498 U.S. 939 (1990); *Chandler* v. *Underwriters Labs., Inc.*, 850 F. Supp. 728, 734 (N.D. Ill. 1994).

the decision with fiduciary status and consequently the twin duties to act prudently and solely in the interests of plan participants. *See* ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). These duties, evolved and derived from the common law of trusts, *see Firestone*, 489 U.S. at 113, require a rigid level of conduct. *See Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

If ERISA plan participants could recover directly as a result of improper performance of fiduciary functions, every benefit claim denial will be challengeable both as a contract claim under section 502(a)(1)(B) and a fiduciary breach claim under section 502(a)(3). This will place lower courts in the anomalous position of deferring to the fiduciary's exercise of discretion when deciding the section 502(a)(1)(B) contract claim, and ensuring that those very same judgments evidence scrupulous care and fidelity to the interests of participants when deciding the section 502(a)(3) claim. Whenever both the fiduciary's interpretation of a benefit plan provision and a participant's contrary interpretation are reasonable, ERISA jurisprudence may require the court to rule that the participant has no contract rights under section 501(a)(1)(B) —if the requisite authority to construe the plan has been granted to the fiduciary—and concurrently hold that such participant was the victim of a fiduciary breach directly remediable under section 502(a)(3).

In light of *Firestone* and its progeny, such an illogical result should be avoided by reaffirming the congressional intent identified in *Russell*, *viz.*, that the exclusive cause of action under ERISA for a fiduciary breach is section 502(a)(2), and this section only allows for relief benefiting the plan as a whole.

Indeed, combining section 502(a)(1)(B) and (a)(3) actions in benefit plan disputes will cause considerable mischief in the real world of benefit plan administration.

In the health care arena, for example, employers are increasingly foregoing traditional indemnity insurance arrangements in favor of self-insuring the cost of employee health benefits.[7] They also are turning to third parties to determine health benefits claims and manage the cost of medical services. A company that sponsors and has assumed the obligation to pay health benefits under the terms of an ERISA plan often contracts with outside parties to perform a variety of managed care procedures, such as pre-service certification, utilization review, or individual case management.[8]

If the door were opened under section 502(a)(3) to allow participants to recover directly for fiduciary misconduct, every time an ERISA plan participant disputes whether the plan contract covers a certain medical procedure he undoubtedly would couple an ERISA section 502(a)(1)(B) claim for benefits with a fiduciary breach claim under section 502(a)(3) against additional parties. The contract claim would allow for recovery against the company or trust that is contractually obligated to fund the ERISA plan, and the fiduciary claim would afford the possibility of recovery against one or more additional parties providing claims determination services.

[7] *See* 1994 Foster Higgins National Survey of Employer Sponsored Health Plans 14 (74% of companies with 500 or more employees self-insure).

[8] Utilization review is the process in which a person, committee, or professional health care organization, often comprised of physicians or nurses independent of the treating physician, prospectively recommends or determines whether a hospital stay or surgical procedure is medically necessary and therefore whether the cost for such services will be paid for by the ERISA plan. *See Corcoran* v. *United Health Care, Inc.*, 965 F.2d 1321, 1323 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992); John D. Blum, *Analysis of Legal Liability in Health Care Utilization Review and Case Management*, 26 Hous. L. Rev. 191, 192-193 (1989). Individual case or disease management is a process in which plan participants with significant medical problems are closely monitored by an independent physician or physician group designated by the plan or its agents to help coordinate the program of treatment. *See* Blum, 26 Hous. L. Rev. at 193.

If, for example, a utilization review panel determines that proposed surgery is not medically necessary,[9] and the third party plan administrator upholds that determination,[10] it would make little sense for a well-counseled ERISA plan participant who chooses to have the surgery to limit his action to a section 502(a)(1)(B) claim asserting that the procedure was medically warranted and therefore covered under the terms of the plan. In all probability, he will sue members of the utilization review panel and the outside administrator under section 502 (a)(3) for fiduciary imprudence and disloyalty in improperly handling or denying the claim.

Professional claims administrators, physicians, nurses, medical records technicians—any person who as an agent for an ERISA plan exercises discretion in determining claims—would be a target of an ERISA fiduciary claim. Such a result would undoubtedly increase the cost of benefit plan administration, and service providers would seek to pass the costs back to the companies that sponsor plans and pay for benefits. This runs counter to efforts to manage health care spending, and should not be countenanced absent a clear indication from Congress that such a result was intended.

[9] ERISA health benefits plans normally limit coverage to "medically necessary" services, specifically excluding experimental or cosmetic procedures. *See, e.g., Florence Nightingale Nursing Serv., Inc.* v. *Blue Cross/Blue Shield Alabama*, 41 F.3d 1476 (11th Cir.), *cert. denied*, 115 S. Ct. 2002 (1995); *Hendricks* v. *Central Reserve Life Ins. Co.*, 39 F.3d 507 (4th Cir. 1994); *Fuja* v. *Benefit Trust Life Ins. Co.*, 18 F.3d 1405 (7th Cir. 1994).

[10] Section 503(2) of ERISA requires every benefit plan to afford a plan participant the right to appeal a denied claim to a named fiduciary, or its designee. *See* 29 U.S.C. § 1133(2). *See also* 29 C.F.R. § 2560.503-1(g).

II. ERISA'S FIDUCIARY DUTY RULES DO NOT IMPOSE COMMUNICATION OBLIGATIONS UNRELATED TO THE DISCRETIONARY ADMINISTRATION OR MANAGEMENT OF A PLAN.

The second issue in this case concerns the extent to which ERISA imposes fiduciary duties with regard to communications that affect the interests of plan participants. The court of appeals held that Varity Corporation breached its fiduciary duty to respondents by misleading them about the financial health of the subsidiary to which they agreed to transfer. However tempted one might be to characterize petitioner's conduct in pejorative terms, all employers and benefit plan administrators will have to abide by the rule governing fiduciary communications announced in this case, and such a rule will surely apply to factual circumstances quite different from those presented by the record here.

ERISA contains very detailed and comprehensive reporting and disclosure requirements designed to keep plan participants apprised of their rights and benefits.[11] In recent years, however, a number of lower courts have

[11] ERISA generally requires that each plan participant be given a summary plan description ("SPD") soon after becoming a participant. ERISA §§ 101(a), 104(b)(1)(A), 29 U.S.C. §§ 1021(a), 1024(b)(1)(A). The SPD must include, among other things, "the plan's requirements respecting eligibility for participation and benefits," the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," and "the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part." ERISA § 102(b), 29 U.S.C. § 1022(b). The SPD must be understandable to the average person and informative of rights and obligations under the plan. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1). An updated SPD must be furnished to each participant every five years if the plan has been amended and every ten years if it has not, ERISA § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B), or upon request, ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). If a benefit plan is amended in any material fashion, a summary of such material modification is to be disseminated to plan participants. ERISA §§ 102(a)(1), 104(b)(1)(B), 29 U.S.C. §§ 1022(a)(1), 1024(b)(1)(B).

held that the duty of ERISA fiduciaries to provide information to plan participants goes beyond these express statutory requirements; these courts hold that ERISA fiduciaries are liable for "failure to provide complete and accurate material information to [plan] beneficiaries." *Bixler* v. *Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1301 (3d Cir. 1993); *see* Pet. App. 13a. This broad duty, in the view of some courts, "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Bixler*, 12 F.3d at 1300; *see also Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990). These courts have located this duty within the common law of trusts and incorporated it into the duties of prudence and loyalty imposed upon fiduciaries under section 404(a)(1) of ERISA. *See Bixler*, 12 F.3d at 1300 (relying upon Restatement (Second) of Trusts § 173, comment d (1959)); *Eddy*, 919 F.2d at 750 (same).[12] What cases such as *Bixler*, *Eddy*, and the decision below have failed to recognize is that employee benefit plans are structurally distinct from common law testamentary or inter-vivos trusts, and that ERISA, by purpose and design, does not impose all of the communication duties of a common law trustee.

As this Court observed in *Mertens*, ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." 113 S. Ct. at 2071 (emphasis in original). That is, persons are denominated fiduciaries under ERISA according to what they do with respect to a plan. Key in this regard is ERISA section 3(21)(A), which provides in pertinent part that "a person is a fiduciary with respect to a plan *to the extent* * * * he exercises any discretionary au-

[12] According to that provision of the Restatement, a trustee "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person."

thority or discretionary control respecting management of such plan, * * * disposition of its assets, * * * [or] the administration of such plan." 29 U.S.C. § 1002(21)(A) (emphasis added).

The effect of the "to the extent" language is to attach fiduciary obligations to the performance of certain conduct relating to an employee benefit plan, and only such conduct. As Judge Easterbrook has rightly observed, "this definition does not make a person who is a fiduciary for one purpose a fiduciary for every purpose. A person 'is a fiduciary to the extent that' he performs one of the described duties; people may be fiduciaries when they do certain things but be entitled to act in their own interests when they do others." *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (citing *John Hancock*, 114 S. Ct. at 523-525).[13]

ERISA limits the scope of fiduciary behavior because it envisions and accepts that many employers will act in a dual role in connection with their benefit programs. As non-fiduciary plan sponsors, employers engage in the business-planning function of determining what kinds and amounts of benefits to provide to employees and how such benefits will be funded. As fiduciaries, employers manage or administer the plan's operations, or, as is increasingly the case, appoint and monitor the performance of outside professionals to perform such functions. *See* p. 12, *supra*.[14] ERISA's circumscribed definition of fiduciary behavior ensures that the heightened standard of conduct imposed upon fiduciaries does not impede employers' ability to structure competitive, cost-efficient benefit programs and make ordinary business operation decisions.

[13] *See* 29 C.F.R. § 2509.75-8 FR-16 Q&A (1994); *Klosterman* v. *Western Gen. Mgmt., Inc.*, 32 F.3d 1119, 1122 (7th Cir. 1994); *Blaw Knox Retirement Plan* v. *White Consolid. Indus., Inc.*, 998 F.2d 1185, 1189-90 (3d Cir. 1993); *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 113 (1986); *see also* Employee Benefits Law, *supra*, at 267.

[14] In this regard, the structure of employee benefit plans is different from traditional common law trusts, where the same person ordinarily does not serve as both trust settlor and trustee. *See generally* George G. Bogert & George T. Bogert, The Law of Trusts & Trustees §§ 104, 121 (2d rev. ed. 1984).

The cases that have ascribed to ERISA fiduciaries all of the duties of a common law trustee whenever a person communicates benefits information have failed to recognize that ERISA's definition of fiduciary conduct represents an "express statutory departure" from the common law, *Mertens*, 113 S. Ct. at 2073 (White, J., dissenting).[15] A misrepresentation made to a plan participant can be a violation of ERISA's fiduciary duty rules *only if the making of the statement itself constitutes the exercise of discretionary authority or control over the management, administration, or assets of the plan.* Similarly, the omission of information in a communication to a plan participant can be a violation of ERISA's fiduciary duty rules *only if the communication represents the exercise of discretionary authority over the management, administration, or assets of the plan.* Consideration of four hypothetical cases will identify where the boundaries should be drawn.

- *Case One*: An employee asks the plan administrator if a much needed but expensive medical procedure he is contemplating is covered by the company health plan. The health plan SPD provides that the administrator is

[15] Although ERISA has roots in the common law of trusts, not every common law trust principle was transplanted into the statute. *See Firestone*, 489 U.S. at 110 ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions * * * 'codif[y] and mak[e] applicable to [ERISA] fiduciaries *certain* principles developed in the evolution of the law of trusts'") (emphasis added) (brackets by the Court) (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)); *Nieto* v. *Ecker*, 845 F.2d 868, 872 n.2 (9th Cir. 1988) (rejecting the "broad[] proposition that ERISA meant to adopt the entire body of state trust law lock, stock and barrel").

responsible for interpreting the plan. The administrator, who personally dislikes the employee, states that the procedure is covered. In fact, the administrator is well aware that although the plan does not expressly refer to the contemplated procedure, the procedure falls under a category of excluded medical services and the plan has historically denied coverage for it. The employee suffers significant out-of-pocket expenses when the plan subsequently denies reimbursement.

This misrepresentation violates ERISA's fiduciary duty rules. A plan administrator who is expressly granted the authority to interpret a benefit plan may not deliberately or negligently misapply the terms or contents of a plan when specifically requested by a participant to interpret the plan or communicate its contents. When a person charged with interpreting the plan is asked to apply the plan to a specific set of facts, that application constitutes a discretionary exercise of control or authority over the plan's administration and a fiduciary activity.[16]

• *Case Two*: A plan provides that upon termination of employment, a former employee may continue his life insurance by converting his group policy into an individual policy. A retiring employee asks his human rights supervisor what he must do to preserve his life insurance coverage and is told to consult his SPD, which expressly explains the conversion rights. The employee does not read the SPD, remains ignorant of his conversion rights, and does not convert his policy. Upon the former employee's death, his spouse files a claim for benefits but the claim is denied because the policy was never converted. The spouse complains that the supervisor should

[16] The result in Case One would be different if the employee had posed his question about coverage to his line supervisor or anyone else who under the terms of the plan lacks interpretive authority. A plan participant would have little cause to rely on such person's judgment concerning the plan, and such person would not act in a fiduciary capacity when rendering an opinion.

have made sure that her husband understood his conversion rights when he asked about them upon his retirement.

No breach of fiduciary duty is entailed by the employer's failure to ensure that the retiring employee understood his conversion rights. Neither an employer nor outside plan administrator is obligated as part of its administrative duties to make sure that each individual participant is fully cognizant of his rights under a plan.[17] By referring the employee to the SPD—which must be understandable to the average person and informative of rights and obligations, *see* 29 U.S.C. § 1022(a)(1), and which explained the rules—the employer has discharged its administrative duties.

• *Case Three*: As part of a corporate down-sizing, an employer decides on November 1 that it will amend its plan effective January 1 to enhance the plan's retirement benefits. Before the plan change is announced, an employee contemplating retirement asks a human resources supervisor if (as rumor has it) the company is considering the adoption of any incentives for early retirement. The supervisor is aware of the decision but does not want to make it known until it is formally announced on December 15, so her answer is noncommittal. The employee retires effective December 1 and does not benefit from the plan change.

The employer has not breached any fiducary duty under ERISA. The employer's failure to advise the employee that he ought to wait until January 1 to retire does not relate to the management or administration of the current version of the plan. Rather, it relates to the company's determination of the future design of the plan. The statement made in Case Three was made in a "cor-

[17] *See Maxa* v. *John Alden Life Ins. Co.*, 972 F.2d 890, 985-986 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993); *Stahl* v. *Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989); *Cummings* v. *Briggs & Stratton Retirement Plan*, 797 F.2d 383, 387 (7th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

porate nonfiduciary capacity." *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323 n.28 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995).

• *Case Four*: An employer that also serves as plan administrator makes a material modification to a plan and provides a summary description of the modification to participants immediately prior to its effective date. A plan participant alleges that he was harmed by not being informed of the plan change sooner.

The employer has not breached its fiduciary duties. The employer provided a summary description of the modification, which functions as an amendment to the SPD,[18] within the time set in ERISA.[19] By communicating the modification prior to its effective date the employer ensured that participants would not be in possession of an SPD whose terms had lapsed, expired, or become misleading. Although the conduct at issue certainly relates to the administration of the plan, ERISA speaks directly to this matter through its rules governing the content of SPDs and the communication of material modifications, and no fiduciary liability can be imposed for acting in conformity with ERISA's express requirements.

* * *

To summarize, *amicus curiae* acknowledges the importance of benefit plan administrators satisfying the carefully considered reporting and disclosure duties enumerated in ERISA, and submits that persons expressly charged with the duty to interpret a benefit plan breach

[18] *See* 29 C.F.R. §§ 2520.104b-3(a), 3(c) (summary of material modification required whenever plan is amended to alter terms described in SPD).

[19] Under section 104(b)(1)(B) of ERISA, a plan administrator must provide participants with a summary of any material modification of the plan "not later than 210 days after the end of the plan year in which the change is adopted." 29 U.S.C. § 1024(b)(1)(B).

their fiduciary responsibilities under section 404(a)(1) of ERISA if they deliberately or negligently misrepresent the terms or conditions under which a benefit plan operates when expressly asked to interpret such terms or conditions. But the text and structure of ERISA do not support the imposition of additional fiduciary duties of communication.

Limiting the liability of persons when they make statements (or fail to make statements) that affect employees' interests in their ERISA-regulated benefits is a fair rule. Fundamentally, the issue here is who should bear the risk when a plan participant suffers a loss based upon a misunderstanding about a plan.

The effect of a rule imposing on employers or outside administrators a duty to communicate all information material to a plan participant's particular circumstances, *see* Pet. App. 13a; *Bixler*, 12 F.3d at 1300; *Eddy*, 919 F.2d at 750, is to shift the risk of loss when misunderstanding occurs from the employee to the employer or outside administrator. The rule embraced by the court of appeals will encourage employees to avoid reviewing and understanding the written benefit plan materials that ERISA requires to be provided, *see* note 11, *supra*, and to resort to oral inquiries to learn about their benefits. It creates this incentive by forcing benefits administrators to undertake a lengthy analysis every time they receive an inquiry—to ensure that they understand the participant's particular circumstances—and to communicate sufficient information so that the participant understands all rights and duties germane to those circumstances. The risk is particularly acute in oral communication because even if benefits personnel impart accurate and complete information, the participant may later claim that such information was not provided.

The inevitable result will be more benefit plan paperwork to memorialize oral communication and increased

costs for welfare benefit plans. *Cf. Mertens,* 113 S. Ct. at 2072. Invariably, employers will cut back on the benefits offered.

It is of course true that the value of a benefits plan is lost upon a participant ignorant of his rights. For that reason, ERISA mandates that plan administrators provide participants in writing all material information relating to the plan. Furthermore, participants ought to be able to make oral inquiries about specific terms and conditions of the current plan without having persons charged with interpreting the plan provide deliberately false or negligent responses.

But ERISA does not make plan fiduciaries responsible for assuring that each plan participant has perfect knowledge about his rights under a plan. The statute recognizes that individuals are in the best position to educate themselves about a plan when they have been provided in writing all essential information and can study and apply that information to their own needs and circumstances.

III. THE MONETARY RELIEF AWARDED BY THE COURT OF APPEALS WAS NOT "APPROPRIATE EQUITABLE RELIEF" WITHIN THE MEANING OF ERISA SECTION 502(a)(3).

In *Mertens,* this Court held that the portion of section 502(a)(3) which authorizes the award of "appropriate equitable relief" is limited to traditional equitable remedies and does not include legal relief. 113 S. Ct. at 2068-70. After paying lip service to that holding, the court of appeals awarded what it said was "restitution" but what in truth can only be described as compensatory damages. Because the court of appeals' decision obliterates the distinction between legal and equitable relief, and thus

renders meaningless the holding of *Mertens,* it cannot stand.[20]

The court of appeals held that the plaintiffs were entitled to receive "payments of money that [they] would have received if they had remained members of the M-F Plan." Pet. App. 18a. Although acknowledging that damages are unavailable under section 502(a)(3), the court said that this remedy was "in the nature of restitution to compensate [plaintiffs] for benefits of which, at the time of trial, they had been deprived." *Id.*[21] Although restitution was a remedy "typically available in equity," *Mertens,* 113 S. Ct. at 2069 (emphasis omitted),[22] the court's award of money to reimburse plaintiffs for lost health benefits cannot fairly be characterized as restitution.

Restitution has two widely-accepted meanings. First, restitution "means recovery based on and measured by unjust enrichment." Douglas Laycock, *The Scope and Significance of Restitution,* 67 Tex. L. Rev. 1277, 1279 (1989). *See also* Restatement of Restitution § 1 (1937)

[20] Under this Court's Rule 14.1(a), the propriety of the relief awarded by the court of appeals under section 502(a)(3) is a "subsidiary question fairly included" within the first question upon which certiorari was granted. *Cf. Missouri* v. *Jenkins,* No. 93-1823 (June 12, 1995) (slip op. at 12-13).

[21] Judge Hansen dissented from this part of the panel's opinion, saying that "[i]n my view our court has taken what the trial court determined were 'compensatory damages' * * * and has fashioned equitable relief by calling it all by another name, i.e., in the nature of restitution." Pet. App. 21a (quoting Pet. App. 114a).

[22] It should be noted, however, that while restitution was *typically* available in equity, it was not *exclusively* a remedy of equity. *See* 1 George Palmer, The Law of Restitution § 1.1, at 3 (1978) ("for a long time restitution developed more or less independently at law and in equity"); *First Nat'l Bank of Waukesha* v. *Warren,* 796 F.2d 999, 1000 (7th Cir. 1986) ("remedies known as 'restitution' were available in courts of law and equity alike before their merger") (Easterbrook, J.).

("[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other"); 1 George Palmer, The Law of Restitution § 1.1, at 2 (1978) (restitution "is liability based in unjust enrichment"). Such recovery is based upon and measured by the extent of the defendant's gains, not the plaintiff's losses. *See* Laycock, *supra*, at 1279; 1 Palmer, *supra*, § 1.1, at 4 (2d Cum. Supp. 1994).

The second proper but less common use of the term is "restoration in kind of a specific thing." Laycock, *supra*, at 1279. *See also* Restatement of Restitution § 4 comments c, d (1937); *id.* § 128; 1 Dan B. Dobbs, Law of Remedies § 4.1, at 551 (2d ed. 1993). In this sense, restitution means the return of the very item wrongfully taken away.

Restitution "is sometimes used in a third sense—to restore the value of what plaintiff lost," Laycock *supra*, at 1282, but that usage has been heavily criticized:

> [R]estitution of the value of what plaintiff lost is simply compensatory damages. Used in this sense, "restitution" loses all utility as a means of distinguishing one body of law from another. Restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant's gain as the measure of recovery. [*Id.* at 1282-83]

Indeed, a number of courts have accepted Professor Laycock's argument that, to be a legally meaningful concept, restitution must be distinguished from compensation. *See Waldrop* v. *Southern Co. Servs., Inc.*, 24 F.3d 152, 158-159 (11th Cir. 1994); *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 539 n.12 (D.C. Cir. 1992) (en banc); *Pratt* v. *Watkins*, 946 F.2d 907, 911-912 n.6 (Temp. Emer. Ct. App. 1991). Thus, as the D.C. Circuit recently remarked, "[w]hatever restitution may encompass * * * we clearly may not collapse it into the broader notion of 'compensation.'" *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 747 (1995). This Court too has recognized that restitution and compensation are distinct. *See, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 24 n.14.

The sums of money awarded by the court of appeals cannot be described as "restitution" except in the impermissible sense of compensation. Indeed, the court of appeals twice said that the award was given to the plaintiffs "to compensate them." Pet App. 18a. It is clear that the award does not fall within the second meaning of restitution—the return of a specific thing taken away. It is equally clear that the award was not rooted in unjust enrichment. The court of appeals did not base the award upon whatever "gain" petitioner realized but rather upon the plaintiffs' loss—*i.e.*, the "money that plaintiffs would have received if they had remained members of the M-F Plan." Pet. App. 18a. And even if the award were based upon a gain to petitioner, because petitioner had reserved the right to terminate completely the plan at any time, and had communicated this right to plan participants, Pet. App. 8a-10a, it is far from clear that any "enrichment" was "unjust."

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court held that the Eleventh Amendment barred a federal court from requiring a state to make retroactive payment of welfare benefits. In so doing, this Court rejected the district court's conclusion that the award was a form of "equitable restitution," *id.* at 665, permissible under *Ex Parte Young*, 209 U.S. 123 (1908), and instead saw it as "a form of compensation * * * in practical effect indistinguishable in many aspects from an award of damages * * * [and] measured in terms of a monetary loss from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 668. Because that statement could just as easily characterize the award at issue here, that award cannot be described as "equitable restitution."

In sum, it is clear that the "restitution" awarded by the court of appeals was nothing more than garden variety compensatory damages—what *Mertens* called "the classic form of *legal* relief." 113 S. Ct. at 2068 (original emphasis).[23] This Court should rectify the distortion of ERISA and *Mertens* engineered by the court of appeals.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[23] In addition to characterizing its remedy as restitution, the court of appeals also relied upon the saying that "[e]quity will treat that as done which ought to have been done." Pet. App. 19a. This is not a traditional equitable remedy, however, but rather an equity maxim—one of "the general principles which govern the courts of equity in the determination of controversies." Henry L. McClintock, Principles of Equity § 24, at 52 (2d ed. 1948). It has been said that "[t]he maxim that equity regards that as done which ought to be done is often more misleading than helpful." *Id.* at 53.